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FINAL BOARDING CALL—THE WARSAW CONVENTION’S EXCLUSIVITY AND PREEMPTION OF STATE LAW CLAIMS IN INTERNATIONAL AIR TRAVEL: *EL AL ISRAEL AIRLINES, LTD. v. TSENG*

HOWARD SOKOL*

“How many smart people from how many countries came up with this?”¹

—SUPREME COURT ASSOCIATE JUSTICE ANTONIN SCALIA

INTRODUCTION

A. *The Warsaw Convention*

The Convention for the Unification of Certain² Rules Relating to International Transportation by Air³ (Warsaw

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¹ Tony Mauro, *High Court Weighs Case Against Airline Security: International Law Limiting Damages Complicates Issue*, USA TODAY, Nov. 11, 1998, at 3A (quoting Justice Scalia who expressed his exasperation at the antiquated and confusing language that is the hallmark of the seventy-year-old Warsaw Convention); Gaylord Shaw, *Does Warsaw Pact Apply? High Court to Decide if Woman Can Sue Airline on Tight Security*, NEWSDAY, Nov. 11, 1998, at A19 (same).

² The use of the word “Certain” and more specifically, the phrase “Unification of Certain Rules” is important in treaty interpretation. The British House of Lords noted the use of this phrase can denote two alternative meanings: (1) that the Convention serves to unify all rules to which it may apply and the Convention charges itself with laying out its only possible exceptions; or (2) that the goal of uniformity is only for the specific situations outlined in the Convention itself and not extending to those outside its purview. See Robert Coleman, *Commentary, I Saw Her Duck: Does Article 17 of the Warsaw Convention “Cover” Injuries or Accidents?*, 7 GEO. MASON L. REV. 191, 228–29 (1998) (citing the House of Lords’ discussion on the preemptive effect of the Warsaw Convention in *Sidhu v. British Airways, plc.*, 1 All E.R. 193, 204–05 (H.L. 1997)).

³ The United States deposited its instrument of adherence on July 31, 1934, thus signifying its intention to be bound by the articles of the Warsaw Convention.

Convention) was borne out of the Second International Conference on Private Aeronautical Law in 1929.⁴ The United States, although not a party to the Warsaw Convention's negotiation and drafting process, ratified the treaty in 1934.⁵ Through a set of uniform rules and provisions, the Warsaw Convention, a multilateral treaty, serves to define and govern the relationship and interdependence between carriers and passengers who are involved in international air travel.⁶ The impetus behind the Warsaw Convention was to aid international air carriers during the expansive, yet turbulent, pre-World War II period.⁷ It filled a void of uncertainty and calmed anxiety by "foster[ing] the growth of the fledgling commercial aviation industry"⁸ thereby providing for consistent rules and regulations.

The Warsaw Convention's delegates and drafters had dual objectives: (1) to create a template of regulation and law that

See In re Korean Air Lines Disaster of Sept. 1, 1983, 1987 U.S. App. LEXIS 12737, at *19 (D.C. Cir. 1987) (noting the "procedure set forth in Article 37 of the treaty" requires the instrument of adherence to be deposited in the archives of the Ministry of Foreign Affairs of Poland); *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1998*, 928 F.2d 1267, 1271 (2d Cir. 1991). On October 29, 1934, the United States entered the Warsaw Convention into force and codified the text of the Convention into the United States Code. *See* 49 U.S.C. § 40105 (1994); Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

⁴ *See* Coleman, *supra* note 2, at 195.

⁵ *See id.*; *see also In re Lockerbie*, 928 F.2d at 1271 ("Although the United States had not participated in the work of CITEJA [the 1925 Paris airline industry conference—*Comité International Technique d'Experts Juridique Aériens*] and only sent an observer to Warsaw, it moved quickly thereafter, depositing its instrument of adherence on July 31, 1934.").

⁶ *See* Alexander N. Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345, 348 (1933) ("The Warsaw Convention provides for the adoption by the States, parties to it, of some unified private law rules on air transportation."); Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle*, 25 TEX. INT'L L.J. 127, 129 (1990) (noting that "the participants wished to establish uniform rules governing the rights and liabilities of parties to contracts of international air carriage").

⁷ *See In re Korean Air*, 1987 U.S. App. LEXIS 12737, at *20 (quoting Secretary of State Cordell Hull: "[The Warsaw Convention] will prove to be an aid in the development of international air transportation . . ."); *see also* Sisk, *supra* note 6, at 129 ("[A] number of nations [hoped] to achieve an international agreement in order to both regulate and encourage the fledgling, pre-World War II aviation industry."). The conferences sought to accomplish these objectives by establishing uniform guidelines that would impose limitations on the airlines' potential liability to travelers together with limitations on the defenses available to the airlines. *See id.*

⁸ *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991).

would transcend the differences in language, culture, and regional law of the participating nations,⁹ and (2) to strike a delicate balance between insuring passengers' interests in recovering damages and protecting international airline carriers by limiting their potential liability.¹⁰

Undoubtedly, treaties, as expressly laid out in the Supremacy Clause of the United States Constitution,¹¹ are the preeminent law of the land.¹² Therefore, in the event of conflict between a treaty's provisions and a particular state law, the treaty will preempt state law.¹³

B. Procedural History

The Supreme Court of the United States recently confronted the challenge of deciphering the articles of the Warsaw Convention.¹⁴ In *El Al Israel Airlines, Ltd. v. Tseng*,¹⁵ the Court sought to determine whether the Warsaw Convention provided

⁹ See Coleman, *supra* note 2, at 195; see also Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 497-99 (1967) (detailing the history of the United States' initial adoption of the Warsaw Convention, while exploring the 1965 denunciation by the United States of the treaty's limits on liability).

¹⁰ See Coleman, *supra* note 2, at 195; Lowenfeld & Mendelsohn, *supra* note 9, at 499.

¹¹ See U.S. CONST. art. VI, cl. 2. The Supremacy Clause, which details the superiority of federal law over state law, provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. While the framers of the Constitution designated the U.S. Constitution to be the "supreme Law of the Land," the text continues that "all Treaties made . . . under the Authority of the United States" are similarly designated. *Id.*

¹² Specifically, as it relates to this Comment, the Warsaw Convention is a treaty and thus deserves the same supreme status as the U.S. Constitution as delineated in Article VI, Clause 2 of the Constitution. See Sisk, *supra* note 6, at 130 ("As a treaty, the [Warsaw] Convention constitutes part of the supreme law of the United States and must be applied notwithstanding state law.").

¹³ See Coleman, *supra* note 2, at 195 ("Like other treaties ratified by the Senate, the Warsaw Convention is the supreme law of the land; therefore, according to the Supremacy Clause of the U.S. Constitution, the Warsaw Convention can preempt state laws.").

¹⁴ See Mauro, *supra* note 1, at 3A ("Justices struggled to determine how [Tseng's] lawsuit . . . should be handled."). The alternatives were whether to allow the suit to proceed in federal court or disallow the suit because of the Warsaw Convention. See *id.*

¹⁵ 525 U.S. 155 (1999).

the exclusive remedy for passengers injured during the course of international air transportation, thereby precluding any causes of action under state law for passengers who fall outside the treaty's purview.¹⁶ The Court granted certiorari to decide this recurring issue after twice refusing to address the preemption issue on similar facts.¹⁷

The Second Circuit United States Court of Appeals tackled two issues in *Tseng v. El Al Israel Airlines, Ltd.*¹⁸ The first concerned the meaning of the word "accident" in Article 17 of the Warsaw Convention.¹⁹ The second, the more wily of the two issues, was whether an injured plaintiff is denied a state law remedy when the Warsaw Convention is not applicable to his or her specific situation.²⁰

Tsui Yuan Tseng initially filed suit in New York State Supreme Court for New York County.²¹ Because the State of Israel, a foreign state, owned El Al Israel Airlines, the airline

¹⁶ On May 18, 1998, the Supreme Court granted the petition for writ of certiorari, but limited the grant to the first question of the petition. See *Tseng v. El Al Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), *cert. granted*, 523 U.S. 1117 (May 18, 1998) (No. 97-475), *rev'd*, 525 U.S. 155 (1999). The first "Question Presented" queried: "Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of 'international transportation' if the injuries were not caused by an 'accident' within the meaning of Article 17 of the Convention?" Brief for Petitioner, *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) (No. 97-475), *available in* 1998 WL 401526, at *.i.

¹⁷ See *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) (disallowing recovery for passengers alleging mental anguish after an airplane narrowly avoided a crash, under the theory that Article 17 does not permit recovery for purely mental injuries); *Air France v. Saks*, 470 U.S. 392 (1985) (denying recovery for a passenger's loss of hearing in one ear allegedly caused by the negligent operation of a pressurization system, where the evidence indicated the pressurization system was operating normally and, therefore, no "accident" had occurred within the meaning of Article 17). In these cases, the Supreme Court did not have a clear record on which to decide a preemption issue. The Court, instead, decided both cases on alternative grounds. In *Floyd*, the Supreme Court reasoned that "[t]he Court of Appeals did not address [the preemption question], and we did not grant certiorari to consider it. We therefore decline to reach it here." *Floyd*, 499 U.S. at 553. In *Saks*, the Supreme Court "[e]xpress[ed] no view on the merits [of a possible state law cause of action] . . . [and] note[d] that it [was] unclear from the record whether the issue [of preemption] was raised in the Court of Appeals." *Saks*, 470 U.S. at 408; see also *Coleman*, *supra* note 2, at 200.

¹⁸ 122 F.3d 99 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

¹⁹ See *id.* at 100.

²⁰ See *id.*

²¹ See *id.* at 101.

removed the case to federal district court.²² Tseng's complaint, which alleged personal injury under New York tort law, charged El Al with "assault, false imprisonment, physical and mental abuse and humiliation, and the loss of and damage to her property."²³ The events leading to the cause of action took place on May 22, 1993 during a pre-flight security check at El Al's terminal at John F. Kennedy International Airport in Queens, New York.²⁴

In March 1996, the United States District Court for the Southern District of New York effectively dismissed Tseng's personal injury claim.²⁵ The court ruled that El Al's security search of Tseng constituted an "accident" within the meaning of Article 17 of the Warsaw Convention,²⁶ and it did not amount to willful misconduct even though the airline's misgivings about Tseng were proven to be misguided and unsubstantiated.²⁷ Furthermore, the court held that, absent a showing that Tseng sustained physical injury or bodily harm, Tseng was not entitled to recover damages from El Al for compensation for her personal injuries and emotional distress.²⁸ Consequently, Tseng was only entitled to \$1,034.90, the maximum allowable recovery, for the loss and damage to her property, as prescribed by Article 22 of the Warsaw Convention.²⁹

Subsequently, on a cross appeal,³⁰ the Second Circuit

²² See *id.* The suit qualified for removal based on the diversity of citizenship of the parties under the authority of 28 U.S.C. § 1441(d). The State of Israel is a foreign state within the meaning of 28 U.S.C. § 1603(a), which states, *inter alia*, that a "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* (quoting 28 U.S.C. § 1603(a)). El Al removed the case from New York State Supreme Court to the Federal District Court in the Southern District of New York. See *id.*

²³ *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 156 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 122 F.3d 99 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

²⁴ See *id.* at 157.

²⁵ See *id.* at 160.

²⁶ See *id.* at 158.

²⁷ See *id.*

²⁸ See *id.* (concluding that the Court's holding in *Eastern Airlines, Inc. v. Floyd* "squarely disallowed any recovery for psychic or psychosomatic injury unaccompanied by bodily injury").

²⁹ See *id.* at 160 (discussing the calculation of Tseng's damages in light of the Convention's limitations on the airline's liability).

³⁰ See *Tseng v. El Al Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999). In the spirit of fair and accurate reporting, it is necessary to mention that the appeal to the Second Circuit was a cross appeal. Tseng appealed the dismissal of her claims for personal injury for failure to establish a recognizable

affirmed in part and reversed in part, remanding the case for further findings.³¹ The court found that the airline's security search of Tseng did not constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.³² Moreover, the court held that Tseng's claim for property loss and damage was covered by Articles 18 and 22 of the Warsaw Convention, but her claim for personal injury was not covered under the provisions and requirements set out in Article 17.³³ Finally, the court found that Tseng was rightfully entitled to bring her personal injury claim under state law.³⁴ The Second Circuit held that a state law claim is not precluded when the event giving rise to a potential cause of action is outside the scope of the Warsaw Convention.³⁵

Finally, in January 1999, the Supreme Court of the United States ruled on the availability of state law remedies when a plaintiff's claim lies outside the scope of the Warsaw

injury under Article 17 and El Al appealed the district court's award to Tseng of just over \$1000 for property loss and damage. In short, El Al believed that Tseng acted outside of the allowable time frame established in the Warsaw Convention in order to contact an airline and report loss or damage to one's personal property. The trial court concluded that extenuating circumstances, as well as El Al's offer to extend the notification period beyond the time frame allowed in the Warsaw Convention, in effect made El Al liable to Tseng for her lost and damaged property. The Second Circuit agreed without much discussion.

³¹ See *id.* at 108.

³² See *id.* at 104; see also *id.* at 102 (stating that while the term "accident" is not defined in the Warsaw Convention, the Supreme Court defined the term as "an unexpected or unusual event or happening that is external to the passenger") (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)).

³³ See *id.* at 104.

³⁴ See *id.* at 108 (holding that "where the Convention is inapplicable, a plaintiff may seek recourse under state law").

³⁵ See *id.* at 105. The Second Circuit found ample support for this proposition. See e.g., *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 618 (7th Cir. 1989); *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 134 (3d Cir. 1984); *Beaudet v. British Airways, PLC*, 853 F. Supp. 1062, 1072 (N.D. Ill. 1994); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1066 (N.D. Ill. 1985); *Rolnick v. El Al Israel Airlines, Ltd.*, 551 F. Supp. 261, 264 (E.D.N.Y. 1982). The court further noted that "[w]here there is no 'accident' the Warsaw Convention is probably inapplicable and the passenger may proceed to use local law to prove a claim." *Tseng*, 122 F.3d at 105. (quoting Lawrence B. Goldhirsch, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 62 (1988)). The court, however, also noted that the Fifth Circuit found that "[t]he Convention's goals of uniformity and certainty would be frustrated were we to allow Mrs. Potter to assert her state law claims, even where the Convention does not provide her a remedy." *Id.* at 106 (quoting *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996)).

Convention.³⁶ In fact, the Supreme Court reversed the United States Court of Appeals for the Second Circuit.³⁷ The Court held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,'"³⁸ is unavailable if those injuries are not recoverable under Article 17 of the Warsaw Convention.³⁹

C. *Comment Objectives*

This Comment analyzes whether the Warsaw Convention provides the sole remedy for injured international air travelers and critiques the Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*.⁴⁰ Part I describes the pertinent facts of the *Tseng* case. Part II sets forth the Warsaw Convention's framework and history and exposes the elements of the Warsaw Convention's relevant articles, while illuminating the newly ratified Montreal Protocol No. 4. Part III surveys the decisions made by the various circuit courts on this issue. Part IV deconstructs the central issue of this case using the question presented as it appeared in the Petitioner's Brief to the Supreme Court. This Comment's analysis interprets the significance and consequences of the definition of "accident" and the ramifications of exclusive remedies. Part V carefully examines the Supreme Court's analysis in light of the arguments advocated by this Comment. Part VI continues with a review of Justice Stevens' dissent in this case. Finally, this Comment concludes that the Supreme Court should have affirmed the Second Circuit's opinion and congratulates the Second Circuit for uncovering the historically elusive Holy Grail.⁴¹

³⁶ See *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 160 (1999).

³⁷ See *id.* at 161.

³⁸ *Id.* (quoting Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23).

³⁹ See *id.*

⁴⁰ 525 U.S. 155 (1999).

⁴¹ Judge Cardamone, writing for the court, noted that their mission in resolving the two issues before them was "reminiscent of Sir Galahad's search for the 'Holy Grail.'" *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 100 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999). The judge continued, noting that "unlike that Crusader . . . we must toil in the valley, examining [materials for statutory interpretation]." *Id.*

I. THE TSENG FACTS⁴²

On May 22, 1993, Ms. Tseng, the plaintiff, a New York resident and clinical nutritionist,⁴³ went to John F. Kennedy International Airport in Queens, New York to board a flight to Tel Aviv, Israel.⁴⁴ After presenting her airline ticket and U.S. passport to a security guard, and while awaiting check-in, she was questioned as to her reasons for taking the trip.⁴⁵ According to the El Al security guard, she gave "illogical"⁴⁶ answers in response to the otherwise routine questions regarding the purpose for her trip, and thus Ms. Tseng was classified as a "high risk"⁴⁷ passenger.⁴⁸ As per El Al's security procedures, she was then taken to a small, private, sparsely furnished room where both she and her belongings were searched for "explosives or detonating devices."⁴⁹

As instructed by two El Al security employees, one male and the other female, Ms. Tseng placed all of her luggage on a security table.⁵⁰ The security guards emptied the contents of her luggage, as well as her purse, into small baskets.⁵¹ The security guards then proceeded, baskets in hand, to "another room into which [Ms. Tseng] was not allowed to follow."⁵² Then the female

⁴² Warsaw Convention cases usually turn on the facts peculiar to each case. The split among the circuit courts involves hairpin turns of interpretation, and slight variances and inferences within the reading and understanding of the Articles of the Warsaw Convention. Therefore, the facts of the *Tseng* case are included so as to facilitate analysis. The facts of the case are taken from the district court's opinion, the Second Circuit Court's opinion as well as newspaper articles. There were conspicuous gaps in the facts in each opinion, but the Second Circuit Court's narration of the events appeared more complete and detailed than that of the district court. Where appropriate, the record of each is cited.

⁴³ See Shaw, *supra* note 1, at A19 (noting that the plaintiff was a New York woman who was employed as a clinical nutritionist at Beth Israel North Medical Center).

⁴⁴ See *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 157 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 122 F.3d 99 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

⁴⁵ See *Tseng*, 122 F.3d at 101.

⁴⁶ *Id.* (stating that "no explanation of why they were considered [illogical] is in the record").

⁴⁷ *Id.* This classification apparently led to the plaintiff's treatment by the airline's personnel.

⁴⁸ See *id.*

⁴⁹ *Id.*; see also *Tseng*, 919 F. Supp. at 157 (noting that Tseng was "taken to a small room with a few chairs and a table").

⁵⁰ See *Tseng*, 919 F. Supp. at 157.

⁵¹ See *id.*

⁵² *Id.*

security guard subjected Ms. Tseng to an extensive full body search.⁵³ Ms. Tseng was asked to remove her jacket, sweater, and shoes.⁵⁴ She was also asked to open and lower her blue jeans to "mid-hip" level.⁵⁵ The body search, conducted exclusively by the female security guard, consisted of a full-body above the clothing manual search, including the breasts and groin area of Ms. Tseng.⁵⁶ The "security search"⁵⁷ lasted approximately fifteen minutes.⁵⁸

When it was finally determined that Ms. Tseng was not a security risk, she was allowed to board the flight.⁵⁹ Ms. Tseng claimed that as a direct result of her detainment and search at El Al's terminal in New York, she "was really sick and very upset"⁶⁰ throughout the flight to Israel.⁶¹ Further, she also testified that she was "emotionally traumatized and disturbed"⁶² during her entire stay in Israel.⁶³ She returned to New York approximately one month later.⁶⁴ Upon her return to New York, Ms. Tseng sought professional medical and psychiatric care, which included treatment for "headaches, upset stomach, ringing in her ears, nervousness and sleeplessness."⁶⁵

Finally, while en route to Israel, Ms. Tseng was unable to find several items and personal effects that ostensibly should have been in her carry-on bag and purse.⁶⁶ Tseng could not find her Rolex watch, jade ring, camera, and \$1,000 in cash.⁶⁷ Furthermore, Tseng inspected her clothes and found them stained and damaged.⁶⁸ Upon arriving in Tel Aviv, Israel, she

⁵³ See *Tseng*, 122 F.3d at 101.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ *Id.* The court noted that "[t]he term 'security search' refers to an intrusive search of a passenger's body initiated after a routine check by metal detector and questioning have led airline personnel to deem a passenger a security risk." *Id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² *Id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 157 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 122 F.3d 99 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

⁶⁶ See *id.*; see also *Tseng*, 122 F.3d at 101.

⁶⁷ See *Tseng*, 919 F. Supp. at 157; *Tseng*, 122 F.3d at 101.

⁶⁸ See *Tseng*, 919 F. Supp. at 157.

telephoned the airline's office to inquire about her property.⁶⁹ According to Ms. Tseng, an employee of El Al told her that she would have to take up the complaint upon her return to New York, and that El Al "was not interested in [her] missing items."⁷⁰ Ms. Tseng did just that. On July 1, 1993, Ms. Tseng presented in writing a full accounting of her missing or damaged property.⁷¹ When she did not receive a satisfactory result from El Al in response to her letter, Ms. Tseng brought suit against the airline.⁷²

II. THE WARSAW CONVENTION: ITS CONTROVERSIAL ARTICLES AND THE MONTREAL PROTOCOL

The following is a discussion of the basic elements of the articles of the Warsaw Convention that were crucial to the Court's, as well as this Comment's, analysis of *El Al Israel Airlines, Ltd. v. Tseng*.⁷³ Moreover, the recent ratification of the Montreal Protocol No. 4 by the United States Senate will unquestionably re-calibrate the mechanism for applying the Warsaw Convention and the scope and reach of these articles.

A. Article 17

Article 17 is perhaps the most prominent of all the Warsaw Convention's forty-one articles.⁷⁴ It is this article that determines, under its provisions, if a passenger's injury is within the scope of the Warsaw Convention.⁷⁵ Article 17 provides that:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.⁷⁶

A simple and unencumbered reading of Article 17 provides

⁶⁹ See *Tseng*, 122 F.3d at 101.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ 525 U.S. 155 (1999).

⁷⁴ See Warsaw Convention, *supra* note 3.

⁷⁵ Article 17 is written in a way that clearly indicates that the clauses and parts of the article are to be read as inter-connecting parts to a larger more intricate whole.

⁷⁶ Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23.

for certain elements, all of which must be met, in order for the Warsaw Convention to apply with respect to liability and recovery for personal injury: (1) the passenger must have suffered either a wounding, bodily injury, or death;⁷⁷ (2) the sustained physical injury or death must have been the result of an accident,⁷⁸ and (3) the accident must have occurred, either on board the aircraft or during the process of embarking or disembarking.⁷⁹

Therefore, if a passenger sustains a physical injury or even death, but not during an "accident," while on board the aircraft or during the process of embarking or disembarking⁸⁰ from the aircraft, Article 17 does not apply. The main disagreement among the courts with regard to Article 17 is the definition and parameters of the word "accident."⁸¹ Deciding whether an accident has occurred conclusively determines whether Article 17 applies.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ Generally, this element of Article 17 is easily met. The meanings of both "embark" and "disembark" have been afforded very liberal constructions, as courts have been willing to look at the surrounding circumstances of a passenger's situation at the time of injury. See, e.g., Robert A. Brazener, Annotation, *When is Passenger on Aircraft in International Transportation Embarking or Disembarking Within Meaning of Article 17 of Warsaw Convention*, 39 A.L.R. FED. 452, 456 (1978) (elaborating on the various meanings of "embark" and "disembark," providing numerous cases depicting courts granting a wide range of latitude in the area, and explaining that "the courts will take into account the totality of circumstances at the time of the passenger injury, including . . . location of the passenger, . . . activities being performed by the passenger, and the degree of control being exercised over the passenger by the carrier").

⁸¹ The Warsaw Convention was drafted in French and does not include a definition section. Therefore, it has been left to the common law to interpret the definitions of key words, which should be terms of art with unambiguous meanings. The various decisions have combined to produce a patchwork of understanding as to certain key provisions of some of the articles. Thus, it is possible to gain a more complete understanding of the law and the direction in which the courts are leaning. For example, the Supreme Court has decided that for the purposes of Article 17, an accident is "an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985) (holding that a normally functioning pressurization system that caused a passenger to lose hearing in one ear was not an accident because the unusual happening was internal to the passenger). The Second Circuit Court of Appeals has decided that a hijacking is an accident within the meaning of Article 17. See *Pflug v. Egyptair Corp.*, 961 F.2d 26, 28-29 (2d Cir. 1992).

B. Article 24

Article 24 of the Warsaw Convention is of primary importance in analyzing the current controversy before the Supreme Court.⁸² Article 24 provides that:

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.⁸³

In section 2, Article 24 relates back to govern Article 17. Article 24 essentially declares that an action for damages by a passenger against an airline based on an Article 17 "violation"⁸⁴ must be brought within the limits enunciated in the Warsaw Convention. Thus, one may be precluded from bringing suit against an airline under the Warsaw Convention if the conditions and elements of Article 17 are not met. The most elusive issue is what it means when a case "covered"⁸⁵ by

⁸² Article 24 is the section from which the argument and controversy of preemption emanates. The Second, Third, and Fifth Circuit Courts of Appeals are split on the issue of whether a state law claim is preempted when Article 17 of the Convention does not apply to the facts of a plaintiff passenger's claim. See *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 108 (2d Cir. 1997) (holding "where the Convention is inapplicable, a plaintiff may seek recourse under state law"), *rev'd*, 525 U.S. 155 (1999); *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996) (stating "[t]he Convention's goals of uniformity and certainty would be frustrated were we to allow Mrs. Potter to assert her state law claims, even where the Convention does not provide her a remedy"); *Onyeausi v. Pan Am*, 952 F.2d 788, 793 (3d Cir. 1992) (noting "[w]hen the Warsaw Convention applies, it is the exclusive remedy for actions against air carriers").

⁸³ Warsaw Convention, *supra* note 3, art. 24(1)-(2), 49 Stat. at 3020, 137 L.N.T.S. at 27.

⁸⁴ The word "violation" is perhaps a misnomer in this situation. Article 17 is a strict liability statute. Once all of the elements are met, liability attaches. The Convention, however, also states that "[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Warsaw Convention, *supra* note 3, art. 20(1), 49 Stat. at 3019, 137 L.N.T.S. at 25.

⁸⁵ What are the implications when it is said that a case is "covered by Article 17"? There are two basic, plausible positions of interpretation. The first is that the Warsaw Convention "covers" only those injuries caused by an "accident" in between the process of embarking and disembarking. In other words, when all of the elements of Article 17 are met, Article 24(2) says that the Warsaw Convention will not apply, and will not "cover" those cases that fail to meet the elements under Article 17, and a passenger may bring his claim based on state law. In this

Article 17.

On face value, these two provisions of Article 24 are fairly straightforward. How a court interprets section 2 of Article 24, however, will determine whether one may have a cause of action, beyond that provided under Article 17, in state tort law.⁸⁶

C. Article 25

Article 25 is central to the discussion of airline liability and preemption of state law. Article 25 provides that:

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful [sic] misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful [sic] misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.⁸⁷

There is a split of authority among the courts as to the purpose of the "willful misconduct" provision contained in Article 25 of the Warsaw Convention.⁸⁸ When willful misconduct is found to have taken place, is the penalty on the airline simply a deprivation of the benefit afforded airlines under Article 22⁸⁹ of the Warsaw Convention in the form of a cap on damages, or does the clause "[t]he carrier shall not be entitled to avail himself of the provisions of this convention"⁹⁰ mean that Article 17 does not

situation, there will be no preemption. The other possible interpretation and reading of Article 24(2) is that Article 17 "covers" all cases of potential injury, but protects the airline carrier and limits its liability to cases that fall within the requirements of Article 17. Therefore, if the elements of Article 17 are not met, for example, if there was no accident, or the injury took place prior to embarkation or after disembarkation, not only would Article 17 not apply, but any other cause of action, including a state law claim, would be preempted. In such a situation, there would be no recourse for the unfortunate injured passenger. See Coleman, *supra* note 2, at 193-94.

⁸⁶ See *supra* notes 34-39 and accompanying text.

⁸⁷ Warsaw Convention, *supra* note 3, art. 25(1)-(2), 49 Stat. at 3020, 137 L.N.T.S. at 27.

⁸⁸ See *infra* note 90.

⁸⁹ Article 22 of the Warsaw Convention sets the limits on liability. Recently, as a result of the Montreal Protocol No. 4, the cap on damages has been raised from \$75,000 (U.S.) to \$145,000 (U.S.).

⁹⁰ Warsaw Convention, *supra* note 3, art. 25(1), 49 Stat. at 3020, 137

apply at all?⁹¹ The debate becomes relevant only when a passenger sustains injury that would otherwise place her squarely within Article 17 but for the willful misconduct of the carrier. The willful misconduct, however, may trigger a state law cause of action.⁹² This would only be the case, of course, if it were determined that the Warsaw Convention does not preempt state law claims when Article 17 is determined to be inapplicable.

D. *The Montreal Protocol*

The Montreal Protocol No. 4⁹³ ("Protocol") was written to amend the Warsaw Convention of October 12, 1929, which had been previously amended by the protocol executed at the Hague on September 28, 1955.⁹⁴ The Protocol was signed in Montreal on September 25, 1975.⁹⁵ The United States, however, did not ratify the Protocol until September 28, 1998.⁹⁶

Specifically, as it relates to this Comment, the Protocol deleted the Warsaw Convention's Article 24 and replaced it with the following language:

L.N.T.S. at 27.

⁹¹ For example, one court contended that Article 25 and Article 17 are not mutually exclusive and that a new cause of action cannot arise from the conditions set forth in Article 25. The court held that Article 25 relates directly to Article 22 which in turn governs Article 17, and that "[i]n cases of willful misconduct, Article 25 strips the carrier of the liability limitation on compensatory damages." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991). Another court, however, held that when willful misconduct is present, Article 17 is no longer applicable to the facts in question. *See In re Hijacking of Pan American World Airways, Inc., Aircraft at Karachi Int'l Airport, Pakistan* on Sept. 5, 1986, 729 F. Supp. 17, 20 (S.D.N.Y. 1990).

⁹² For this "lucky" plaintiff, it would be solely the act of the willful misconduct on behalf of the airline that would grasp the cause of action out of the jaws of the Warsaw Convention and lay it gently into the familiar and more accommodating environs of state law.

⁹³ Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, as amended by the Protocol done at the Hague on Sep. 8, 1955 [hereinafter Montreal Protocol No. 4], ratified by the U.S. on Sept. 28, 1998, *reprinted in* S. EXEC. REP. No. 105-20 (1998).

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 n.14 (1999) (noting that "[t]he President signed the instrument of ratification for Montreal Protocol No. 4 on November 5, 1998"); 144 Cong. Rec. S11059 (daily ed. Sept. 28, 1998). The Protocol entered into force in the United States ninety days later, on March 4, 1999 as per the procedure delineated in the Protocol. *See id.*

In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.⁹⁷

The Protocol chose not to use the more restrictive language “[i]n the cases covered by Article 17.”⁹⁸ Rather, the Protocol changed this clause to use language such as “any action,”⁹⁹ “however founded,”¹⁰⁰ and “without prejudice”¹⁰¹ to describe the claims that may be brought under the Warsaw Convention. The Protocol excluded the possibility of bringing any claims under state law. Clearly, the Protocol imposed the Warsaw Convention as the sole remedy for passengers seeking relief for their claims as a result of damages they have suffered. These damages would always be “subject to the conditions and limits of liability set out”¹⁰² in the Warsaw Convention.

The Protocol not only completely rewrote the old Article 24 of the Warsaw Convention, but it also replaced the Warsaw Convention’s Article 25 with the following language:

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.¹⁰³

Two significant changes are present in the new version of Article 25. First, the revision eliminated the high standard of “wilful misconduct”¹⁰⁴ and replaced it with a lower standard of

⁹⁷ Montreal Protocol No. 4, *supra* note 93, art. VIII, reprinted in S. EXEC. REP. No. 105-20, at 29 (1998).

⁹⁸ Warsaw Convention, *supra* note 3, art. 24(2), 49 Stat. at 3020, 137 L.N.T.S. at 27; see also *id.*, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23.

⁹⁹ Montreal Protocol No. 4, *supra* note 93, art. VIII, reprinted in S. EXEC. REP. No. 105-20, at 29 (1998).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Montreal Protocol No. 4, *supra* note 93, art. IX, reprinted in S. EXEC. REP. No. 105-20, at 29 (1998).

¹⁰⁴ Warsaw Convention, *supra* note 3, art. 25, 49 Stat. at 3020, 137 L.N.T.S. at 27.

culpable conduct. The language in the new Article 25 describes this lower burden. Now, a plaintiff need only show that the circumstances surrounding his injury were "done with intent to cause damage or recklessly and with knowledge that damage would probably result."¹⁰⁵ Second, the new Article 25 expressly refers to Article 22, illustrating the intention of the Protocol to not create a new cause of action for reckless behavior. The new version of Article 25 keeps all reckless or willful actions within the Protocol's purview but removes the limits of liability provided by Article 22 upon proof of the lower standard of culpable conduct.¹⁰⁶

III. THE SPLIT AMONG THE CIRCUIT COURTS CRIES OUT FOR CLOSURE

The circuit courts have split over whether state law causes of action are preempted by the Warsaw Convention once it has been decided that an "accident" has not taken place within the meaning of Article 17. If the incident is not a case within the confines of Article 17, the question becomes whether the reading of "cases covered" cited in Article 24 serves to preempt or, rather, to invite a claim based on state tort law.

The Supreme Court confronted the preemption issue for the first time in *El Al Israel Airlines, Ltd. v. Tseng*.¹⁰⁷ Until this decision, the different holdings and interpretations of the circuit courts were inapposite of the purpose for which the Warsaw Convention was created—to create uniformity and limit potential airline liability.

In *Abramson v. Japan Airlines, Co.*,¹⁰⁸ the United States

¹⁰⁵ Montreal Protocol No. 4, *supra* note 93, art. IX, reprinted in S. EXEC. REP. No. 105-20, at 29 (1998).

¹⁰⁶ See *id.* (providing that "the limits of liability specified in Article 22 shall not apply [upon proof of the culpable conduct as outlined in Article 25]").

¹⁰⁷ 525 U.S. 155 (1999).

¹⁰⁸ 739 F.2d 130 (3d Cir. 1984). In *Abramson*, the plaintiff, Mr. Abramson, and his wife were flying to Tokyo from New York. See *id.* at 131. Mr. Abramson suffered an attack from a pre-existing hernia. See *id.* His wife asked a stewardess if her husband could perform his usual "self-help" remedy, which consisted of "lying down, massaging his stomach... [and] occasional[ly]... self-induced vomiting." *Id.* Though there were "nine empty seats in the first class section," the stewardess advised Mr. Abramson's wife that there were no empty seats. *Id.* Mr. Abramson contended that, as a result of being told there was no space for him to perform his self-help remedy, he was prevented from ameliorating his condition. See *id.* Mr. Abramson's condition worsened, requiring hospitalization upon landing, and an

Court of Appeals for the Third Circuit, in reversing the district court's holding, analyzed the situation by reasoning that, "[s]ince we have already concluded that Abramson's injury was not covered by Article 17 because there was no 'accident,' Article 24(2) does not by its express terms limit maintenance of actions brought under local law."¹⁰⁹ Thus, the Third Circuit construed the phrase "cases covered" in Article 24(2) to apply to those cases in which there would be Article 17 strict liability.¹¹⁰ Therefore, according to the Third Circuit, the Warsaw Convention did not preempt state law claims.

In *Potter v. Delta Air Lines, Inc.*,¹¹¹ the United States Court of Appeals for the Fifth Circuit, in affirming the district court's granting of summary judgment to the defendant airline, analyzed the situation by looking to sources external to the Warsaw Convention itself.¹¹² The court looked to the purpose of the Warsaw Convention and the need to preserve the drafters' intent to create uniformity within the international airline

immediate return to the United States for surgery. *See id.* The district court granted summary judgment to the airline, reasoning that Article 17 did not apply absent a showing that an accident had taken place. *See id.* Consequently, as per the district court, if Article 17 were no longer relevant, there could be no cause of action. The Third Circuit noted the district court's holding that, "the absence of an 'accident' precludes liability, both compensatory and punitive, under the state law negligence and willful misconduct claims." *Id.* at 131-32 (internal quotations and citation omitted). The Third Circuit concluded, however, that it was error for the district court below to have not reached the state law claims, expressly holding that "alternative theories of recovery" are not barred "[w]hen the Warsaw Convention is inapplicable." *Id.* at 135; *see also* Coleman, *supra* note 2, at 212-16 (discussing the Third Circuit approach in *Abramson* as to preemptive state law claims).

¹⁰⁹ *Abramson*, 739 F.2d at 134.

¹¹⁰ *See id.* at 134-35.

¹¹¹ 98 F.3d 881 (5th Cir. 1996). The plaintiff, Mrs. Potter, while on a plane en route to Europe, tried to maneuver back into her seat on her way back from the lavatory. *See id.* at 882-83. Mrs. Potter's foot got stuck on the carpet, resulting in a twisted knee and torn ligaments. *See id.* at 883. She subsequently brought suit against Delta Air Lines. *See id.* The district court granted summary judgment to the defendant, reasoning that because there was no "accident," Article 17 did not apply and, further, that the Warsaw Convention's Article 17 provided the exclusive remedy. *See id.* at 882-83. Thus, Article 17 preempts a state law cause of action. *See id.*; *see also* Coleman, *supra* note 2, at 222 (detailing the facts in *Potter*).

¹¹² *See Potter*, 98 F.3d at 885-87 (examining case law that provided a test for non-express preemption). In *Potter*, the court recognized that there was no express preemption in the Warsaw Convention. *See id.* at 885. Therefore, the court considered whether a non-express preemption could be implied by determining "whether (1) the area requires uniformity vital to national interests . . . (2) there is evidence of congressional design to preempt the field . . . or (3) the state statute actually conflicts with the federal provision." *Id.* at 885.

industry.¹¹³ The court determined that reading Article 17 together with Article 24 resulted in an implied preemption of any state law claims.¹¹⁴ The conflict with regard to the Warsaw Convention's preemption had therefore involved the Second Circuit (*Tseng*), Third Circuit (*Abramson*), and the Fifth Circuit (*Potter*).

IV. THE QUESTION PRESENTED

It is clear that various federal courts, especially the circuit courts, have been wrestling with the Warsaw Convention for many years.¹¹⁵ As the volume of international air travel continues to increase year after year, the articles and provisions of the Warsaw Convention become more relevant and of more import to growing numbers of people. Yet, the split of authority in the circuit courts frustrated the Warsaw's Conventions twin goals of uniformity and certainty. The *Tseng* case presented the Supreme Court with the opportunity to resolve the precise issue that had confounded the circuit courts: "Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of 'international transportation' if the injuries were not caused by an 'accident' within the meaning of Article 17 of the Convention?"¹¹⁶

The petitioner, El Al Israel Airlines, had honed the issue down to this precise question. On its face, it seemed as though the petitioner had only asked one straightforward question. Upon further reflection, however, the issue turns out to be quite complex. In order to facilitate this Comment's discussion of the preemption issue, it is necessary to parse the above question into its fundamental elements, and to reason towards an ultimate conclusion.

A. *Step One: What is an "accident"?*

Clearly, something planned or routine is not an accident. An accident involves an unplanned event that is neither expected, predicted, nor orchestrated. Still, an accident is

¹¹³ See *id.* at 885-86.

¹¹⁴ See *id.*

¹¹⁵ See *supra* notes 108-14.

¹¹⁶ Brief for Petitioner, *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) (No. 97-475), available in 1998 WL 401526, at *i.

something that is not only unexpected, but is also not the norm. It is infrequent, unusual, and something that connotes fear and unrest. Sometimes a physical injury and loss of some ability or talent accompany an accident, at least for temporary periods of time.

The expectations of the parties involved may shed some light on the parameters of an accident. To illustrate the role expectations play, consider a roller coaster ride at an amusement park. Two friends board a small, metal car in order to climb and otherwise zigzag around a complicated structure for a fine and challenging visceral four minutes of speed, wind, and excitement. If, when the ride comes to an end, one of the friends becomes ill, while the other is perfectly fine, can we in good conscience say that an accident has occurred? Probably not. This would be the case even if they both had ridden the machine many times before, because ultimately this reaction is not that uncommon nor is it a remote possibility. The sick rider's condition could have been caused by the rider's recent diet and ingestion of food, or because the rider was suffering from the side effects of alcohol or medication. The rider's condition could also be at least partially self-induced by a neurotic, over-active psyche. In any event, one would be hard pressed to consider the rider's reaction an "accident."

By contrast, if the roller coaster derailed, or a piece of the track itself gave way, throwing the occupants from the car, the resulting physical and emotional injuries would be the result of an "accident." In other words, the roller coaster was not expected to derail or throw the occupants from the car. Yet, in the first example, the uneventful roller coaster ride caused different people to have differing physical, and possibly emotional, reactions to the very same routine ride without there being an "accident" in the conventional sense of the word. The initial question, then, is whether a given event is not only an accident, but an "accident" within the meaning of Article 17.

Specifically, the issue becomes whether the security search in *Tseng* constituted an "accident." In order to answer this question, it is vital to keep in mind that security searches at airline terminals, particularly at international airline terminals, are not only routine, but necessary.¹¹⁷ Furthermore, El Al

¹¹⁷ The FAA has regulations that require airlines to implement security

Airlines, the national airline of the State of Israel,¹¹⁸ must be especially careful in light of Israel's precarious position, both geographically and ideologically, in the world today.¹¹⁹ In *Air France v. Saks*,¹²⁰ the Supreme Court, without the benefit of a definition section for the Warsaw Convention, described the word "accident" as "an unexpected or unusual event or happening that is external to the passenger."¹²¹ The Court then observed that, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident."¹²² The federal judicial system is replete with rulings as to what is not considered an "accident" within the meaning of Article 17 and the Warsaw Convention. For example, "events such as a passenger's death by natural causes, fights between passengers, routine re-pressurization of the aircraft, and injuries resulting from intoxication,"¹²³ were all deemed not to be included within the definition of "accident."

This Comment posits that a fifteen-minute body search, during a routine security check, cannot be considered an "accident," particularly at an airline known to be very strict and meticulous when checking people in for boarding their flights. Tseng's subjective feelings during and after the security check are irrelevant as to whether an accident occurred. As the Second

procedures to prevent terrorist attacks. See *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 103 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999); see also 14 C.F.R. § 129.25(b), (g) (1999) (requiring security checks and safety measures to be in place, and mandating that the airline deny transportation to anyone who refuses to consent to a security check).

¹¹⁸ See William A. Orme Jr., *El Al at a Turning Point; A Mirror of Israel's Divisions Prepares to Go 49% Public*, N.Y. TIMES, Mar. 5, 1999, at C1 (stating that El Al Airlines is "the Israeli international flag carrier").

¹¹⁹ El Al Airlines follows strict security measures because of "[i]ts history as a terrorist target." *Id.* El Al Airlines is "perhaps the most security-conscious carrier in the world . . . [and that] baggage inspections and pre-flight security checks are carried out in deadly earnest, with the company's own state-of-the-art equipment and specially trained personnel." *Id.*

¹²⁰ 470 U.S. 392 (1985).

¹²¹ *Saks*, 470 U.S. at 405.

¹²² *Id.* at 406. The reasoning of the Supreme Court is analogous to the roller coaster hypothetical above, focusing on external events for accidents, and not on the internal reactions of a passenger.

¹²³ John R. Schmertz, Jr. & Mike Meier, *In Suit Against El Al Airlines, Second Circuit Rules that Intrusive Body Search of Female Passenger Not "Accident" Covered by Warsaw Convention But That Passenger May Pursue Injury Claims in State Courts*, 3 INT'L L. UPDATE 7 (1997).

Circuit held: "[E]ven though the event of which plaintiff complains occurred during the course of her embarkation on defendant's airplane, there was no accident and she suffered no bodily injury."¹²⁴

B. Step Two: If and When is the Warsaw Convention the "Exclusive" Remedy for Passenger Injuries?

Central to the present case is whether the Warsaw Convention provides the exclusive remedy for passengers injured during the course of international air travel, thereby precluding and preempting a state law claim.¹²⁵ As described in Part II.B., there are arguments to be raised on both sides of this issue. The interrelationship between Articles 17, 24, and 25 determines the extent to which, if at all, the Warsaw Convention can preempt state law claims.

*Krys v. Lufthansa German Airlines*¹²⁶ illustrated the intricacies of the Warsaw Convention and its provisions.¹²⁷ The *Krys* case underscored the need to balance the interests of the passenger and those of the airline. *Krys* also emphasized the uncertainty inherent in the delicate balancing of those interests.¹²⁸ The plaintiff in *Krys* suffered a heart attack on board a plane en route to Europe.¹²⁹ The decision makers on the plane—captain, lead crew personnel, etc.—as per the advice of a doctor on board the flight, thought it unnecessary to make an emergency landing.¹³⁰ Mr. Krys sued the airline claiming that although it was not the proximate cause of his injury, the airline's negligence in not landing sooner exacerbated his medical condition.¹³¹ Initially, the defendant airline, relying on *Potter v. Delta Air Lines, Inc.*,¹³² argued that because there was no accident, Article 17 did not apply.¹³³ Further, the defendant argued that the Warsaw Convention and Article 17 preempted

¹²⁴ *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

¹²⁵ See *supra* note 107 and accompanying text.

¹²⁶ 119 F.3d 1515 (11th Cir. 1997).

¹²⁷ See *Coleman, supra* note 2, at 198.

¹²⁸ See *id.*

¹²⁹ See *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1517 (11th Cir. 1997).

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² 98 F.3d 881 (5th Cir. 1996).

¹³³ See *Krys*, 119 F.3d at 1518 n.8; see also *Coleman, supra* note 2, at 198.

any other claim, irrespective of whether Article 17 was applicable or not.¹³⁴ In response to the plaintiff's reply, however, and with severe uncertainty as to how the Eleventh Circuit was going to decide vis-à-vis the other circuit courts, the defendant reversed course and sought to insulate itself within the limited liability of the Warsaw Convention.¹³⁵ The defendant airline, therefore, argued that an accident had indeed taken place.¹³⁶ Though perhaps a good legal tactic, this strategy certainly highlights the need for a uniform rule on this issue.

The plain text of the treaty,¹³⁷ including the terminology "cases covered by Article 17" as stated in Article 24(2), combined with the direct wording and structure of the elements in Article 17, clearly indicate that the Warsaw Convention is not the exclusive remedy for injured airline passengers. Further, the Supreme Court has noted that "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."¹³⁸ Accordingly, the Second Circuit, in *Tseng*, cited to a variety of evidence that supported the finding that the drafters of the treaty did not view the treaty as an exclusive remedy.¹³⁹

This Comment advocates the position that the Warsaw Convention is not an exclusive remedy to those passengers injured during the course of international air travel. Specifically, Article 17 becomes irrelevant when its elements are not met. In other words, the phrase "cases covered by Article 17"

¹³⁴ See *Krys*, 119 F.3d at 1517, 1518 n.8.

¹³⁵ See *Krys*, 119 F.3d at 1518 n.8; see also Coleman, *supra* note 2, at 198-199.

¹³⁶ See *Krys*, 119 F.3d at 1518 n.8.

¹³⁷ A good starting point when construing treaties is the plain meaning analysis of the language of the agreement itself. See generally David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994).

¹³⁸ *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943).

¹³⁹ See *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 105 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999). Rather, the drafters assumed that passengers would have recourse to national law in specific cases. See *id.* ("[T]he French delegate exclaimed that 'naturally' the common law would apply [to cases excluded from the Convention under Article 34]."). The court also noted that when the Czechoslovakian delegation learned that the Warsaw Convention's name was changed to refer to the Unification of "Certain Rules," it withdrew its proposed article that stated, "[i]n the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply." *Id.*

in Article 24(2) refers only to those cases where injury is caused by an "accident" occurring on board the aircraft itself, or during the process of embarking and disembarking the aircraft. The limiting language of Article 24(2) logically implies that there are cases *not* covered by Article 17. Therefore, if all of the elements of Article 17 are not met, Article 24(2) instructs that the Warsaw Convention will not apply, and will not "cover" those cases that fail to meet these elements. Because the limits of liability are only to be imposed on cases covered under Article 17, the Convention's limitations should not apply to cases not covered by Article 17. Consequently, a passenger whose injury is not within the ambit of Article 17 should be able to bring his claim based on state law because no federal preemption would have arisen under the Convention. The Court of Appeals for the Second Circuit correctly decided this issue when it held that the Warsaw Convention did not preempt a state law claim that did not meet the elements of Article 17.¹⁴⁰

The Warsaw Convention was drafted at a time when very few people in America could afford international air travel. The order of the day in the 1920s was to protect the airline industry from potential lawsuits and other catastrophes that could potentially bankrupt even the most solvent airline. It was not the drafters' intent for the Warsaw Convention to be an exclusive remedy for every injury associated with air travel. The airline industry was concerned with potential plane crashes, resulting in serious personal injuries and deaths that could expose the fledgling industry to financially devastating claims. The drafters did not envision security searches, x-ray devices, and other modern day security precautions so ubiquitous to air travel today. The technological capabilities of the airplane were the source of concern. Therefore, the Warsaw Convention was only intended to apply to an accident that resulted in physical injury or death. Article 17 is clear on this.¹⁴¹ The Convention should not be used to obliterate state tort law remedies relating to international air travel incidents that were not directly envisioned by the drafters.

Article 24(2) is extremely clear on its face.¹⁴² With an

¹⁴⁰ See *id.* at 108.

¹⁴¹ Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23.

¹⁴² See discussion *supra* Part II.B.

exception made for the exact meaning of "accident," Article 17 is arguably crystal clear as well.¹⁴³ Interpreting the term "cases covered" to mean anything more than what it means from a plain reading of the text would be counterintuitive. If the purpose were simply to grant the airline industry wider protection, the question would have to be asked, at whose expense? Furthermore, if one believes there is no preemption of state law when the Warsaw Convention and Article 17 do not apply, then one is not mutually excluded from believing in and supporting the Warsaw Convention's goal of uniformity. For those "certain rules"¹⁴⁴ to which the Warsaw Convention applies, the limitations apply fully and equally to all of its signatories. Without doubt, there should be a remedy for the passenger who slips on a wet floor and breaks a leg while waiting in line to go through a security check. There should be a remedy as well for the senior citizen who breaks a hip or an arm because he trips on a broken stair, or over a torn piece of carpet, while attempting to board the plane. In situations where the Convention does not apply, there is no issue of uniformity. Quite simply, the drafters did not intend the Warsaw Convention to provide absolute uniformity of remedy for all unexpected events encountered by international air travelers.

In fact, if one is to argue that the Warsaw Convention presents the exclusive remedy, where are the safeguards for the passengers? There must be a balancing of interests. For if we were to say that the Warsaw Convention was intended to be the sole avenue of recovery, what passenger protections would exist to offset the potential negligence of the airlines? The deterrent effect of tort law liability would be lost if federal preemption is found to limit the airline's liability in all cases. Why should an international air passenger be required to forego remedies, thereby giving the airlines carte blanche to be as negligent as they want to be, constrained only by the possible cost of the Convention's low limits of liability?

In fact, the Convention allows the limits of liability to be set aside in Article 25, but only for the small subset of events that occur based on a standard of willful misconduct by the airline. As mentioned earlier, Article 25 does not create a separate cause

¹⁴³ See discussion *supra* Part II.A.

¹⁴⁴ See *supra* note 2 (noting that the actual title of the treaty begins with the words "Certain Rules").

of action in the event of willful misconduct.¹⁴⁵ When there is willful misconduct, assuming the Warsaw Convention and Article 17 otherwise apply, all that changes is that there is no longer a safety net of limited liability. Presumably, if a plaintiff cannot prove willful misconduct and the Warsaw Convention preempts local tort law through Article 17, the plaintiff's limited recovery may well inhibit recoveries from negligent airlines. The possibility of opening the floodgates of litigation—the fear of some scholars, airline executives, lobbyists, and even Supreme Court Justices—are unfounded.¹⁴⁶ Thus, uniformity and certainty in the laws, rules, and expectations of potential liability, are still preserved when the Warsaw Convention applies. When the Warsaw Convention does not apply, uniformity is a non-issue, because then the focus is on passengers' rights. It has been an arduous task to balance and maintain passengers' rights against the limitations imposed by the airline-friendly Warsaw Convention. Since its inception, however, the Convention, through Article 25, has expressly protected passengers from instances of willful misconduct on the part of the airlines. Though the high threshold of willful misconduct has been supplanted by the lower standard of reckless behavior in the Montreal Protocol No. 4,¹⁴⁷ international airline travelers should have access to the tort law recoveries that would otherwise be available.

Finally, another compelling argument for non-exclusivity is the recent ratification of the Montreal Protocol No. 4.¹⁴⁸ The

¹⁴⁵ See *supra* notes 89-91.

¹⁴⁶ During oral arguments in the *Tseng* case, "Justice Stephen Breyer speculated aloud that if the passenger's suit goes forward, 'millions of cases' could be brought against airlines for complaints ranging from too-hot coffee to cold germs circulated through the ventilating system." Mauro, *supra* note 1, at 3A. With all due respect to Justice Breyer, why are passengers on whom coffee is spilled to be deprived of their right to recovery? What of those passengers getting their limbs caught in malfunctioning electronic doors? The point is simply that, contrary to popular belief, most people do not engage in lawsuits even though they get hurt or otherwise injured in their everyday lives at one time or another. Why is it more important to protect the deep pockets of the international airline industry than to allow an avenue of recovery for arguably tens of thousands of legitimate potential plaintiffs each and every year? Was it really the intention of the drafters of the Warsaw Convention to insulate the industry from negligence claims not directly involving an accident within the meaning of Article 17?

¹⁴⁷ See discussion *supra* Part II.D.

¹⁴⁸ The U.S. Senate ratified the Montreal Protocol No. 4 on September 28, 1998. See 144 CONG. REC. S11059 (daily ed. Sept. 28, 1998). As per the procedure outlined

recent ratification of the Protocol effectively made seemingly slight, yet very significant, changes to Articles 24 and 25 of the Warsaw Convention.¹⁴⁹ Logically, if the Protocol had nothing to add, clarify or change, why would the Senate have seen a need to ratify it? The point here is a rather straightforward one: If the Protocol makes it clear that the Warsaw Convention preempts state law claims, then what was the status of the Warsaw Convention before ratification and without the amendments the Protocol added? Presumably, the Convention was theretofore a nonexclusive remedy.

V. THE SUPREME COURT GROUNDS TSENG

On January 12, 1999, the Supreme Court of the United States, in an 8-1 decision, decided *El Al Israel Airlines, Ltd. v. Tseng*.¹⁵⁰ In an opinion authored by Justice Ginsburg, reversing the Second Circuit, the Supreme Court held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' if not allowed under the Convention, is not available at all."¹⁵¹

A. *The Majority*

The majority opinion concludes on three concentric levels that Article 24 of the Convention precludes any recourse to state law when a passenger cannot maintain a claim under Article 17 of the Convention. First, the Supreme Court interpreted the French phrase "les cas prévus à l'article 17"¹⁵² as "refer[ring] generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking, and simply distinguished that class of Article 17 cases from cases involving damaged luggage or goods, or delay."¹⁵³ Tseng and the Second Circuit interpreted the above phrase to include "those cases in which a passenger could

in the Warsaw Convention, the Protocol entered into force on March 4, 1999, 119 days after the President signed the instrument of ratification. See *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 175 n.14 (1999).

¹⁴⁹ See discussion *supra* Part II.D.

¹⁵⁰ 525 U.S. 155 (1999). Justice Stevens was the lone dissenter. See *id.* at 177.

¹⁵¹ *Id.* at 161 (alteration in original) (citation omitted).

¹⁵² *Id.* at 167 n.11 (noting that when the phrase is literally translated, it means "the cases anticipated by Article 17" or "the cases provided for by Article 17," (citations omitted)).

¹⁵³ *Id.* at 168.

actually maintain a claim for relief under Article 17.”¹⁵⁴ Thus, the Supreme Court found that “Article 24 would preclude a passenger from asserting any air transit personal injury claims under local law.”¹⁵⁵ The Second Circuit’s approach is more consistent with the interests of justice, and stands in sharp contrast to the conclusory rationale adopted by the Supreme Court. If the French phrase quoted above was meant to include all possible cases, even those claims which are unsustainable under Article 17, then what is the purpose of the additional wording of “l’article 17”? The Court, however, gave great weight to the views of the Executive Branch regarding the construction and application of the phrase.¹⁵⁶

This Comment asserts that this is an overbroad and overinclusive application of the original text of the Convention. It is speculative and takes advantage of a phrase that is at best ambiguous, and, at worst, opportunistic. The French phrase includes the wording “l’article 17,” which properly grants an airline passenger more rights through a very narrow interpretation of the original drafters’ intentions.

Second, the Court proffered that the Montreal Protocol No. 4 amended an already preemptive—albeit unclear—Article 24 of the Convention.¹⁵⁷ In other words, the Court understood the Protocol as an amendment of clarification rather than one of addition or subtraction. Today, the preemptive force of the Warsaw Convention as a result of the Protocol is unequivocal.¹⁵⁸ It is submitted that the pre-amended Article 24 did not demand preemption when one could not maintain a claim under Article 17. Rather, the “revised Article 24 provides for preemption not

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* (noting that “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight” (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982))).

¹⁵⁷ See *id.* at 174–75.

¹⁵⁸ The Montreal Protocol No. 4 states: “In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention . . .” Montreal Protocol No. 4, *supra* note 93, art. VIII, reprinted in S. EXEC. REP. No. 105-20, at 29 (1998) (amending Article 24 of the Warsaw Convention) (emphasis added). It is now clear that the Warsaw Convention is an injured party’s only avenue of recovery. If one fails to meet the elements spelled out in Article 17, recourse to a state tort law remedy will be foreclosed.

earlier established.”¹⁵⁹ It defies credulity that the Supreme Court could genuinely posit that an elaborate and all-encompassing Montreal Protocol No. 4 amended the pre-World War II Article 24 of the Warsaw Convention only to achieve what the treaty had accomplished some 65 years earlier. The Warsaw Convention is inarguably ambiguous. The fact that federal preemption of state law generally occurs only when the federal law’s directives are clear or when absolutely necessary pursuant to public policy concerns; and the necessity and existence of the Montreal Protocol No.4, all support this conclusion. It is more logical, as this Comment submits, that the pre-amended Article 24 of the Warsaw Convention should not have been interpreted to preempt those claims which fall outside the requirements of Article 17.

Finally, the Court observed that “[t]he cardinal purpose of the Warsaw Convention . . . is to ‘achiev[e] uniformity of rules governing claims arising from international air transportation.’”¹⁶⁰ While it is certainly accurate that the drafters of the Warsaw Convention wished to provide uniformity among its signatories, uniformity was only aspired to in those situations expressly provided for in the treaty’s provisions. In a situation such as Tseng’s, therefore, the drafters probably did not even conceive of such a claim. Hence, they were not concerned with uniformity in non-Article 17 type situations. In looking for support in the British House of Lords, the Court once again relied on another misconstruction of the Convention’s provisions.¹⁶¹

¹⁵⁹ See *Tseng*, 525 U.S. at 174-75 (explaining Tseng’s position that federal preemption of state law is generally disfavored particularly in the areas of health and safety, and alluding to Justice Stevens’ dissent that unless a treaty’s intention is clear, as with other pieces of federal legislation, it should not given an overbroad reading and preempt able and existing state law); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (discussing the presumptions against preemption with regard to the federal preemption of state causes of action in relation to medical devices).

¹⁶⁰ *Tseng*, 525 U.S. at 170 (quoting *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530, 552 (1991)).

¹⁶¹ See *id.* at 173-74. The *Tseng* Court used the reasoning in *Sidhu v. British Airways plc.*, 1 All E.R. 193 (H.L. 1997), to show that the word “certain,” as used in the Convention’s title, applied only to certain types of rules governing certain types of situations. See *Tseng*, 525 U.S. at 173. For example, the Convention would not apply to an airline’s obligation to carry insurance. The Convention is “‘a partial harmonisation, directed to the particular issues with which it deals.’” See *id.* at 173-74 (quoting *Sidhu*, 1 All E.R., at 204). The English court further elaborated

*B. Justice Stevens' Dissent*¹⁶²

In a purposeful, succinct dissenting opinion, Justice Stevens modestly asked for consistency in the application of the doctrine of preemption as applied to treaties when compared to the way it is applied to other federal laws. Justice Stevens wanted to know why the Court does not attempt to infer meaning and preempt existing state law when there is a gap, ambiguity, or silence in other areas of federal legislation, such as an Act of Congress. When dealing with a treaty, however, a court, as the Supreme Court did in *Tseng*, will preempt state law with little hesitation, even though it is unclear whether it was the Treaty's intent to do so. Justice Stevens commented that "[e]veryone agrees that the literal text of the treaty does not preempt claims of personal injury that do not arise out of an accident . . . [and] that nothing in the drafting history requires [such a] result."¹⁶³ He is right. This Comment has promoted the idea that treaties should not be read to preempt state law when the treaty is silent as to what should happen in a given situation, and particularly when preemption would deny the plaintiff a remedy.

Although Justice Stevens conceded that the drafters intended by-and-large for the treaty's provisions to supersede local state law, nevertheless there are some notable exceptions to this general rule.¹⁶⁴ For example, Article 25 expressly creates an exception for injury arising out of "willful misconduct."¹⁶⁵ Just

that personal injury is a particular issue which the Convention addresses in an effort to secure its objective of uniformity. *See id.* at 173. This Comment seeks to take this reasoning one step further and propose that the Warsaw Convention may indeed deal exclusively with the particular issues implicated in Article 17. But if Article 17 is not triggered, personal injury claims not within the ambit of Article 17 should not be preempted by the Convention because the drafters did not intend to unify the rules in such situations.

¹⁶² *See Tseng*, 525 U.S. at 177.

¹⁶³ *Id.* at 181 (Stevens, J., dissenting).

¹⁶⁴ Justice Stevens believed that *Tseng's* case should either qualify as a personal injury resulting from an accident or as a result of the willful misconduct of El Al's agents. Stevens was constrained, however, as was the Court, by a stipulation of the parties to consider the case as one that belonged in neither of those categories, but rather as a scenario which lay in the silent abyss of the treaty. *See id.* at 178-79 ("I believe . . . that petitioner's alleged misconduct was either an accident . . . or involved willfulness Be that is [sic] it may, the parties have insisted that we decide the case on the assumption that it belongs in the sliver about which the treaty is silent.").

¹⁶⁵ *Id.* at 178 (quoting Warsaw Convention, *supra* note 3, art. 25(1), 49 Stat. at 3020, 137 L.N.T.S. at 27).

as the interest for uniformity is discarded when it comes to injury that arises out of the willful misconduct of the defendant as per the will of the drafters, so too "the interest in uniformity would not be significantly impaired if the number of cases not preempted, like those involving willful misconduct, was slightly enlarged to encompass those relatively rare cases in which the injury resulted from neither an accident nor a willful wrong."¹⁶⁶ As mentioned above, non-accident personal injury cases should not be preempted by the Convention. In fact, by not preempting scenarios in which the Warsaw Convention is silent, not only would the Court not be compromising the drafters' hope for uniformity, but the Court would also be upholding their intentions to apply the treaty as expressed provisions as expressed in the particular provisions.

CONCLUSION

The Supreme Court analyzed the Articles of the Warsaw Convention and voiced its authority for all the federal courts to hear. The viewpoints of this Comment, however, are at odds with the Supreme Court's decision. The Court went through the step by step analysis promoted in this Comment, but failed to reach a similar conclusion. Awareness of linguistic differences and appropriate time period considerations are two factors that were conspicuously absent from the Supreme Court's analysis. After all, the context that drives thoughts and ideas to be reduced to writing is often just as important as the words themselves. This Comment has attempted to show that the definition of accident, the ramifications of exclusivity, and the Montreal Protocol No. 4 all directed the court to a safe landing—affirming the Second Circuit's opinion. This safe landing would not have led to a flood of cases as speculated, but rather would have yielded only a boarding pass to state court for a passenger who had already paid for her ticket. Unfortunately, the Supreme Court has instead chosen to cancel the flight for passengers seeking recovery in state court or, as in the *Krys* case, chosen to ignore the consequences of continuing the flight without providing a remedy to a passenger in need of a safe

¹⁶⁶ *Id.* at 180 (explaining that the Convention's purpose would not be eviscerated, let alone compromised, if non-accidental personal injury cases were treated as cases preempted by the Convention).

landing. The Supreme Court has turned a blind eye to passengers who must surrender their rights in order to take an international flight.

